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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 98

MATILDA ROUMANIA WALKER, *Petitioner*

v.

EDITH CECILIA FOSTER, ET AL., *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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JURISDICTIONAL STATEMENT

Rule 19 of the *Rules of The Supreme Court of the United States* makes it clear that review on a writ of certiorari is not a matter of right, but of sound judicial discretion. With this in mind, Respondents contend that the Court should not exercise its jurisdiction in this matter for the reasons hereinafter stated:

STATEMENT OF THE CASE

This action originated in the United States District Court for the District of Columbia on October 1, 1964,

when the Respondent herein, Edith Cecilia Foster, filed a partition suit against her sister, the Petitioner, Matilda Roumania Walker, two other sisters, Mary Alice Branch and Margaret Vera Peters, and her sister-in-law, Ruth Margaret Peters.

All those defendants, save the Petitioner above, filed answers to the said action and joined the Petitioner in praying the court for the granting of the relief sought which was a partitioning and sale of a parcel of realty in the District of Columbia which the said parties owned as tenants in common.

This improved property had been inherited by the five party litigants from their father, George Peters who died intestate in 1937. The cotenancy of a group of cousins was eliminated through an adverse possession decree that was entered by the same court on March 27, 1961, in Civil Action No. 1017-58.

Following a hearing, an order for a partitioning was entered by the said Court on December 2, 1964, in Civil Action No. 2419-64, in favor of the Respondents.

The Petitioner herein filed a notice of appeal on December 14, 1964, and the case was docketed in the U. S. Court of Appeals for the District of Columbia Circuit on January 14, 1965, No. 19,130. On March 11, 1965, the appeal was dismissed by per curiam order. The mandate of the said Court of Appeals was issued on April 21, 1965.

OPPOSITION TO PETITIONER'S STATEMENT OF POINTS

1. A suit for partition and sale of realty is an equitable action and affords no right to a jury trial.

2. Although alleged in her Answer to the partitioning suit, the Petitioner herein failed to even offer any proof that Fannie Peters "had ownership in the property."

3. The alleged granting of attorney's fees is not germane to this case; none having been granted or even requested.

4. Assuming that the Petitioner has a right to occupy the property without paying rent, this will not prevent a judicial partitioning of the property.

ARGUMENT

1. The denial of a jury trial was not in violation of the Petitioner's constitutional rights. The right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution remains inviolate only where it was accorded to an individual in a suit at common law prior to 1789. *Amendment Seven to the United States Constitution.* Moreover a suit for partition and sale of real property is an equitable action and affords no right to a trial by jury. *Green* v. *Fiske,* 103 U.S. 518.

2. On the death of their father, George Peters, in 1937, the mother of the parties, Fannie Peters, acquired only a dower interest in the property. On March 18, 1953, she died intestate. Title to the fee therefore did not pass through her. Any wishes expressed by her regarding the property (which have never been adduced by the Petitioner) would not prevent the respondents from exercising their right to alienate the property with the aid of the Court, which they obtained.

3. The attorneys fees alluded to by the Petitioner were granted in the administration of the estate of George Francis Peters, late husband of Ruth Margaret Peters, one of the Respondents herein, in Administration No. 104,605. This order was entered on 25 October 1963 and was not appealed. The matter therefore is not in issue here.

4. Petitioner now asserts that the Respondents are estopped from seeking partitioning for their alleged "failure to seek a voluntary partition at first." Not only is this untrue, but, since this was not raised at trial, (or even in the appeal below) it is not an issue.

5. Finally, Petitioner claims that she and her family have a right to occupy the premises without having to pay rent. Why she feels entitled to occupy premises in which she has a mere one-fifth interest without making a nominal contribution to the other non-occupancy owners, she does not say.

However, this too is not an issue, for the order of 25 October 1963 requiring her and one of the Respondents, between them, to contribute $15 a month to each of the other three cotenants having a one-fifth interest in this $27,500 property for the exclusive habitation of the premises was not appealed from and constitutes another belated assertion which is not germane.

Even if the point were timely raised it would not deprive the Respondents of their right to partitioning. *Willard* v. *Willard*, 145 U.S. 116.

CONCLUSION

Because in this purely equitable action no right to a trial by jury is guaranteed or appropriate, no encumbrance to the Respondents' right of alienation has been shown, and the orders of the trial court 18 months ago regarding attorney's fees and "rent" were not appealed, and because the question of the Respondents not first seeking a voluntary partitioning is raised herein for the first time, and there is no constitutional question involved, the application of the Petitioner for a writ of certiorari should be dismissed.

Respectfully submitted,

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